

MARY E. COCHENOUR  
Assistant Attorney General  
P.O. Box 201401  
Helena, MT 59620-1401  
Telephone: (406) 444-2026

COUNSEL FOR STATE

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

STATE OF MONTANA,  Plaintiff,  v. DAVID HOWKE,  Defendant.	Cause No. _____  <b>STATE'S MOTION FOR LEAVE TO FILE INFORMATION AND SUPPORTING AFFIDAVIT</b>
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STATE OF MONTANA     )  
  :ss  
County of Lewis and Clark )

Mary E. Cochenour, Assistant Attorney General for the State of Montana, moves the Court for leave to file an Information charging the Defendant, David Howke, with the offense of Theft, by common scheme, a felony, as specified in Mont. Code. Ann. §§ 45-6-301(5)(b) and 45-2-101(8).

Mary E. Cochenour, after first being sworn upon oath, deposes and says, based on information and belief, that investigative information developed and provided to her by John Komora, Agent for the Division of Criminal Investigation of the Montana Department of Justice (DCI), demonstrates probable cause to believe that the Defendant has committed the offense charged on or about and between April 9, 2013 and March 20, 2015. The investigative information relied upon by affiant to support probable cause is as follows:

1. With some exceptions, every employer in Montana shall provide workers' compensation insurance to compensate employees who may suffer an on-the-job injury or occupational disease. Mont. Code Ann. § 39-71-401. Montana State Fund (State Fund),

located in Helena, Lewis and Clark County, Montana, is a nonprofit, independent public corporation established for the purpose of providing an option for employers to insure their liability for workers' compensation and occupational disease coverage.

2. Montana Code Annotated § 45-6-301(5) provides that a person commits the offense of Theft if the person purposely or knowingly obtains or exerts or helps another obtain or exert unauthorized control over any part of any benefits provided under the Workers' Compensation Act by means of deception or other fraudulent actions. A person convicted of the offense of Theft shall be fined an amount not to exceed \$50,000 or be imprisoned in the state prison for any term not to exceed 10 years, or both.

3. A person who both earns wages and collects workers' compensation benefits without the consent of the insurer is guilty of the offense of Theft. Mont. Code. Ann. § 39-71-701(7).

4. On January 20, 2015, State Fund Fraud Coordinator John Forsman (Forsman) referred an allegation of Theft to DCI. Forsman had received a confidential fraud tip that the Defendant, David Howke, was working and earning wages while also collecting workers' compensation wage loss benefits at the same time. Included in Forsman's referral was an investigative report prepared by Montana State Fund Fraud Investigator Shane Shaw (Shaw) and video surveillance of the Defendant. Shaw's case file included policy notes, medical information, and other policy documents related to the Defendant's workers' compensation claim.

5. Agent Komora was assigned to investigate the case. Agent Komora reviewed State Fund's case file and discovered that the Defendant filed a workers' compensation insurance claim on December 18, 2012, for an injury that occurred on December 8, 2012, at a construction site. The First Report of Injury (FROI) form indicated that the Defendant was working for Aeneas Enterprises when he injured his back while lifting concrete forms at a job site in Big Fork, Montana. The FROI form indicated that the Defendant was injured on December 8, 2012, and reported the injury to a supervisor on December 10, 2012. The

employer noted on the form that there was reason to question the accident because the Defendant “also works a side job on farm on weekend.”

6. State Fund accepted the claim and paid medical benefits and continuing bi-weekly temporary total disability (TTD) benefits of \$822 based on information that the Defendant could not return to work due to the injury. Under Montana law, a person who knowingly or purposely earns wages while also collecting TTD wage-loss benefits is guilty of theft. Mont. Code Ann. § 39-71-701(7). In two separate letters, State Fund warned the Defendant of the consequences of a criminal prosecution if benefits were received illegally.

7. State Fund continued to pay the bi-weekly TTD benefits as the Defendant represented to medical professionals and Montana State Fund that he could not return to work due to the pain caused by his work-related injury. However, in February 2014, the Defendant missed a doctor’s appointment and had been making excuses as to why he had missed other appointments. The State Fund claims examiner handling the Defendant’s case referred the Defendant’s claims to the State Fund Fraud Unit for further investigation.

8. On November 3, 2014, Montana State Fund received a confidential fraud tip that the Defendant was working “under the counter,” was playing golf all the time and bragging that he played up to 36 holes of golf daily. The caller gave specific information where the Defendant had been working. Investigator Shaw learned that the Defendant performed construction and remodeling work for wages for several businesses in the Flathead County area. The Defendant did not report to State Fund that he was working and earning wages while also collecting the TTD wage loss benefit.

9. Investigator Shaw met with Cindy O’Boyle, Tracy McAllister and Marcie Christenson, the individuals mentioned by the confidential source who might have information about Howke working.

10. O’Boyle told Shaw in a telephone interview, on December 10, 2014, that she had given Howke furniture worth approximately \$3,000 for work he conducted at her place of business in May 2013. This work consisted of replacing flooring and fixing doors. O’Boyle

added that Howke had his own construction company and that he was doing some concrete work at the same time he was working for her. O'Boyle provided Shaw with a bid for the work from Howke and a list of the furniture given to Howke in lieu of cash payment.

11. Agent Komora conducted an interview with O'Boyle on February 10, 2015, to memorialize the information she provided earlier to Shaw and to obtain further information about the work Howke did for her. O'Boyle stated that of the nine tasks Howke listed on the bid, he completed all but two. The ones he completed involved removing and replacing trim and door thresholds, removing existing carpeting, subfloor preparation, and new floor installation. Based on the information from O'Boyle, it appears Howke worked for her from April 9 to May 2, 2013, and received over \$3,000 worth of wages in the form of property.

12. On December 1, 2014, Shaw conducted a telephone interview of Tracy McAllister, who had lived with Howke for several years. McAllister and Howke lived at 21 Honeysuckle, in Kalispell, starting in August 2012 until June/July 2014, when they moved to 810 O'Brien until she left at the end of August 2014. While living at the Honeysuckle residence, Howke and McAllister agreed to work on the house in exchange for credit toward a down payment to purchase the house. This work included painting, flooring, deck and yard work that she believes was completed before Howke's injury. She added that she and Howke moved a number of large rocks during the summer of 2013, by placing them on plywood that Howke then pulled by rope moving them to a separate location.

13. McAllister stated that, while injured, Howke performed construction-type work at Top to Bottom, Montana Woman Magazine, possibly at residences owned by Willie Vasquez and his father, and possibly at the Whitefish Liquor Store with which Howke placed a bid. McAllister also told Shaw that Howke played golf one to two times per week at either the Village Green or Whitefish Lake Club courses. McAllister also provided Shaw copies of the banks statements from the First Interstate Bank checking account she shared with Howke. These monthly statements are from January 2013 to November 2014. With these statements were photocopies of deposit slips (and associated checks) made by

McAllister and Howke. According to McAllister, several of the checks were payable to Howke for the construction work mentioned previously.

14. On December 10, 2014, Shaw conducted an unrecorded interview with Marcia Christenson in which she stated she hired Howke for office space renovations in a building she owns in Kalispell. She paid Howke \$1,010 for labor and \$765 for materials. Christenson faxed Shaw a copy of the invoice provided to her by Howke. While reviewing the invoice, Agent Komora noted the invoice indicated Howke worked on the Christenson Properties building located at 185 Commons Loop in Kalispell, Suites A, B and C. The work included framing doorways, and framing, sheet rocking and painting walls. Handwriting on the invoice indicated that Christenson paid Howke \$765 on 12/7/13 and \$1,010 on 12/20/13.

15. On February 10, 2015, Agent Komora conducted a recorded interview of Christenson to memorialize information she provided earlier to Shaw and to obtain further information about the work Howke did at the business. Christensen reported that McAllister (who worked for the previous tenant, Farmers Insurance) suggested they hire her boyfriend, Howke, to make the repairs. Agent Komora showed a copy of the invoice provided by Howke to Christenson and she confirmed she paid Howke \$765 for materials on December 7, 2013, and \$1,010 for labor on December 20, 2013. Other than these two dates, Christenson could not recall exactly which dates Howke initially began and finished the remodel work. However, she noted on the invoice that the work was completed on January 29, 2014. Christenson said Howke worked alone.

16. On January 13 and 15, 2014, Shaw conducted an unrecorded interview with Diane Bitney, officer manager for Dermatology Associates. Bitney stated that Howke was hired in January 2014 to do remodeling in the business's work space to include painting, installation of cupboards and a counter top, and install wood trim and carpeting. Bitney stated that Howke was paid \$2,800 for materials on the first day of work and \$3,217 for labor on the last day of work. Bitney stated the remodel took approximately three weeks to complete. Bitney provided Shaw with a copy of the invoice from Howke to the business.

17. On February 10, 2015, Agent Komora conducted a follow up recorded interview of Bitney. Bitney confirmed that her company, Dermatology Associates, is located at 175 Commons Loop and, that in January 2014, they moved their billing office to 185 Commons Loop, Suite A. That move required them to conduct some remodeling work in Suite A. The company chose Howke, since Christenson had hired him to do other work in the building. Bitney stated Howke painted the suite, installed carpeting in the outer office, back office and Bitney's office, installed a window, and molding around the bottom of the wall. Bitney confirmed Howke was paid \$2,800 on January 22, 2014 for materials and \$3,217 on February 10, 2014, for labor.

18. Bitney stated that Howke performed his work at different times of the day, that is, during business hours, after hours and on weekends. She normally saw Howke only during business hours doing painting and pulling up carpet in the front office and opined that he seemed able-bodied and she never heard him complain about pain. Bitney stated that she never saw any other workers assisting Howke.

19. In February 2014, State Fund hired Mission Mountain Investigations to conduct surveillance on Howke. Private Investigator Dick Hirschi (Hirschi) videotaped Howke during this time period. Agent Komora reviewed the DVD containing video surveillance and made several observations.

20. On February 24, 2014, Hirschi video recorded Howke shoveling snow and using a snow blower to remove snow from the driveway at 21 Honeysuckle Lane in Kalispell, Montana. Howke did not show any physical limitations during this time, was able to bend at the waist, use the shovel with both hands and throw the snow off to the side.

21. On March 4, 2014, Hirschi video recorded Howke shoveling snow from his driveway on Honeysuckle Lane for approximately eight minutes. Howke did not show any physical limitations during this time, was able to bend at the waist, use the shovel with both hands, lean over and throw the snow off of the cement. The next day, Hirschi

observed Howke enter an enterprise called Golf Headquarters. The business sells golf equipment and has a golf simulation apparatus with which golfers can play simulated golf courses using their own golf clubs. Hirschi was unable to see Howke inside the business.

22. On July 17, 2014, Hirschi video recorded Howke at the Whitefish Lake Golf Club. Howke was observed running from a truck and getting a ball retriever, lifting it up over his head and placing it into a golf bag, returning to the truck in a golf cart, getting into and out of the cart several times, removing the golf bag with his right hand while cradling several items in his left hand and putting the golf bag into the truck. Howke's movements included running, bending at the waist, raising his hand above his head, carrying a golf bag with one hand and opening and closing the truck door all while showing no physical limitations.

23. In July 2014, State Fund hired Day & Associates, Inc., to conduct surveillance on Howke. Private Investigator Ryan Zimmer (Zimmer) videotaped Howke during this time period. Agent Komora reviewed the DVD containing video surveillance and made several observations.

24. On July 24, 2014, Zimmer video recorded Howke at the Whitefish Lake Golf Club. At 1:22 p.m., Howke took numerous practice golf swings, teed off on the first hole and pushed his walking push-cart down the fairway, with one hand at times and with two hands at times. At 2:23 p.m., Howke is recorded taking a golf shot with an iron club. At 2:31 p.m., he bends over putting his weight on his right foot and picks up a ball, straightens out and walks, then squats down to pick up a golf club head cover. At 2:35 p.m., he takes a shot with an iron club then pushes his cart down the fairway. At 2:46 p.m., Howke hit a ball out of the sand bunker then bent over and smoothed out the sand with a rake. At 2:49 p.m. he squats down bending both legs to place a ball on the putting surface. At 4:48 p.m., Howke runs up four steps to a tee box near a water hazard then shortly thereafter bends over with his weight on his right foot, his left foot is off the ground, places a ball on a tee and takes a tee stroke. Howke is recorded taking numerous

other golf strokes throughout the recording. At 7:27 p.m., Howke arrives at his truck pushing his cart, removed his golf bag from the cart and places it into the front passenger seat. During this golf outing, Howke appears to possibly have a slightly antalgic gait appearing to favor his right lower side or legs but otherwise showing no physical limitations walking, bending over, picking up golf balls from the ground, or swinging golf clubs.

25. On August 13, 2014, at 10:33 a.m., Zimmer observes Howke for the first time that day walking out of the Professional Therapy Associates building, entering his Ford truck and returning to his residence. At 11:29 a.m., Howke began loading a number of goods from his residence into the bed of his truck. These items included what appeared to be 15 Rubber Maid-type plastic containers/tubs stacked three levels high. He departed in his truck at 12:12 p.m., and arrived at C.J.'s Storage at 12:25 p.m. Soon thereafter Howke and an unknown male unloaded the items from his truck to a storage unit. Howke is next recorded back at his residence at 1:25 p.m., and again loaded household items into his truck. These items included a chainsaw, a lawn mower, lawn tools/implements, wood boards and a metal wheelbarrow, which he lifted over the raised tailgate and placed on top of other items. Howke departed in his truck at 3:23 p.m., and arrived at C.J.'s Storage at 3:33 p.m. There he unloaded the items and placed them into the storage unit. Surveillance was discontinued before all the items were placed into the storage unit.

26. On August 14, 2015, Private Investigator Jason Dugan, also from Day & Associates, Inc., recorded Howke and a white female at his residence place household goods into the bed of his Ford truck. From approximately 10:43 a.m. to 12:02 p.m., Howke was recorded placing numerous items (to include the large plastic tubs as on the day before) into the bed of his truck. The items were stacked several levels high rising above the roofline of the passenger compartment. Items were also placed into a Ford Escape SUV. At 12:20 p.m., Howke departed in his truck and traveled to C.J.'s Storage at 12:37 p.m., as does the Escape. Howke and the female unloaded the vehicles and placed



the items into the storage unit until the recording is discontinued at 12:59 p.m. The video picks up again at the residence with Howke again loading household items onto a flatbed trailer towed by a green Chevy. These items include a table with folding legs approximately 60" x 40" which Howke carries with one hand down the residence's deck stairs and places onto a flatbed trailer, a coffee table, a dining table leaf, an ottoman that he carries on his right shoulder, and other furniture. At 3:03 p.m., Howke and the female lift a cabinet approximately 6' tall onto the trailer. The green Chevy (driven by an unidentified male) tows the trailer, and Howke and the female in his truck depart at 3:46 p.m. Video recording continues at 4:02 p.m., with Howke, the female and the other male unloading the items into the storage unit at C.J.'s Storage until 4:17 p.m.

27. At 5:03 p.m., surveillance is continued with Howke at the Whitefish Lake Golf Club playing golf. As on July 24, 2014, Howke plays golf with no visible signs of discomfort or physical limitations. Howke completed this round of golf at 8:22 p.m.

28. On September 24, 2014, Dugan video recorded Howke entering and exiting the Professional Therapy Associates building and practicing golf at the Whitefish Lake Golf Club. Howke was seen at the therapy building exiting then re-entering his Ford truck, refueling the truck, loading golf clubs into his truck, and arriving at the golf course. He walks with the golf clubs and arrives at what appears to be the driving range at 12:37 p.m., and hits golf balls until 1:45 p.m. Howke leaves the driving range and arrives at the putting practice green where he practices putting for approximately 15 minutes.

29. Based on the above information, the Defendant was working and earning money while also receiving TTD wage loss benefits. The Defendant failed to notify State Fund that he had earned a wage while collecting benefits and that he was capable of working. State Fund would not have paid the TTD benefits between April 9, 2013 and March 20, 2015, had State Fund known that the Defendant was earning money performing construction work. Alternatively, State Fund would not have paid the TTD benefits had it known that Defendant was capable of working during that time. The total amount of TTD

benefits State Fund would not have paid during that time period is approximately \$27,478.23.

30. Based on these facts, the affiant believes probable cause exists that the Defendant has committed the alleged offense of felony Theft. Accordingly, the affiant moves the Court for leave to file the requested Information.

Respectfully submitted this \_\_\_\_\_ day of September, 2015.

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MARY E. COCHENOUR  
Assistant Attorney General

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of September, 2015.

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LaRay Jenks